United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

74-2655

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P/S

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA ex rel
ALFRED LEWIS,

Petitioner-Appellant,

-against-

Docket No.
74-2655

ROBERT J. HENDERSON, Superintendent
of Auburn Correctional Facility,

Appellee.

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REPLY BRIEF FOR PETITIONER/ APPELLANT

LAWRENCE STERN
Attorney for Petitioner/
Appellant
11 Monroe Place
Brooklyn, N.Y. 11201
(212) 875-4304

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ARGUMENT

THE ATTORNEY GENERAL'S BRIEF IN OPPOSITION MISSTATES THE FACTS AND ERRONEOUSLY CHARACTERIZES APPELLANT'S ARGUMENT.

1. Appellant has never, and does not now, rely solely on his own testimony of physical beatings as proof that the confessions were involuntary. (In reply to Appellee's Brief at pp. 18,30). He relies on the established facts of his pretextural arrest, 38 hour incommunicado detention, 19 hour overnight interrogation without food or sleep, direct promise by the Police of assistance in court and indirect promise, in the absence of any rights advice, that his confession by revealing the money would not be used against him in court (i.e., Detective Beckles statement, "the best you can do is get the money and you say that it is yours; let them know where it is." (T. 325-326)). The issue of "will overbearance" or mental coercion, was raised initially at the trial, where all these facts were elicited, in the police testimony , and was there rejected as irrelevant by the trial court (T. 667). It was raised at the Huntley hearing and once again the same judge failed to even consider these established facts (See the Huntley hearing opinion in Appellant's appendix). And, the issue of mental coercion arising from the police testimony, was squarely presented to the federal habeas court below in appellant's pro-se petition.

> Since it is undisputed the defendant's testimony that he was interrogated in the 30th Precinct about the bank robbery.... over the very extended period previously indicated, and that this interrogation was continued in the 42nd Precinct.... and uncontradicted that over this entire period the defendant had no food and no sleep.... it is clear that upon these undisputed and uncontradicted facts, even apart from the defendant's uncontradicted testimony of physical assaults.... the defendant's will was overborne and the confessions and the leading of the police to the money were not the products of a rational intellect and a free will unaffected by mental or psychological pressure.
>
> (Pro Se petition at p. 15)

Indeed, appellant's reliance at the Huntley hearing, on the facts as elicited in the trial testimony was an acknowledgement that his own credibility would carry little weight with Judge McCaffrey who had refused to even charge the jury on mental coercion and who had sentenced him to the harsh term of 30-60 years. Rather, he was hoping to influence the judge once again with the facts as the police stated them and with the facts the People failed to establish or contradict as part of their burden (in addition to presenting his two eyewitnesses, Jones and Johnson). This decision to rely on those facts, of course, did not disentitle him to a fair and complete Huntley decision on the basis of those facts (In reply to Appellee's Brief at p. 26).

2. The people of the State of New York were charged with the ultimate burden of proving appellant's confessions voluntary,

yet they produced as witnesses to that effect two police officers who, off the bat, denied being in appellant's presence during the entire interrogation in a dormitory room in the 30th Precinct throughout the 19 hours of that interrogation on the night and morning of February 17-18, 1958 (In Reply to Appellee's Brief at pp. 10, 20, 22). Both Beckles and Corbett testified that they were present most of the night in the 30th Precinct house (There were times when they were absent), but that other policemen, whom they could (or would) not name, conducted the interrogation of appellant in that separate dormitory room, and that they were not there. (T. 337, 347; HM 58-59, 69, 73-a). Thus, neither of these two witnesses could testify of his own knowledge that appellant ate or slept on the night and morning of February 17-18 (In Reply to Appellee's Brief at p. 10). Corbett specifically testified,

> "I wasn't present in the room; I didn't see him eat..." (T. 350)
>
> "I don't think he slept, but I don't know. I wasn't with him. (T. 382)

Indeed, if he was permitted to sleep, it could only have been at 20 minute intervals when he was awakened and interrogated. (HM 73a-74, 68).

On the other hand, the facts to which these two People's witnesses could testify of their own knowledge are the facts upon which appellant, and the Supreme Court, have relied for a totality of psychologically coercive circumstances: the promises both Beckles and Corbett admitted making to appellant

(T. 381, 371, 325-326, 366-367); the basic time sequence of incommunicado detention from 8:30 or 9:00 P.M. on February 17 to arraignment at 10 A.M. on February 19; the fact of interrogation overnight in that dormitory room; the fact that at no no time was appellant ever advised of his constitutional rights (HM 83); the fact that appellant's initial arrest was a pretext since there was no evidence linking him to the bank robbery at that time and since Beckles, the arresting officer, admitted that at the 30th Precinct he was, "involved with the investigation of this robbery that the defendant, Alfred Lewis, was eventually convicted of" (HM 59), and because the alleged assault complaint of Mrs. Waller was an obvious pretext since she did not testify to any assault (In Reply to Appellee's Brief at pp. 4,27). The fact that this was an illegal detention is important in the totality of circumstances, because it establishes that the purpose of the detention was to extract a confession of the bank robbery, that is, to obtain the evidence against appellant on the bank robbery which at the time of arrest the police did not have. Appellant was certainly not being detained on the assault, since all the necessary evidence for that would have come from the allegations of Mrs. Waller, and appellant could have been immediately arraigned. Appellant was being held so that, and until, a confession could be extracted from him, and it is obvious that the tactics used on him overnight and the next day were for that purpose.

Thus, the witnesses offered by the People to meet their burden actually testified for appellant and established the involuntariness factors. But, these facts have always been ignored by the New York State courts, and the habeas court below (see Infra). Appellant's alternative argument is that his allegations of physical beatings by policemen other than Beckles and Corbett were not contradicted by Beckles and Corbett who pleaded ignorance as to what went on behind the closed doors of the dormitory room. The People had the burden, not of producing "every conceivable witness" (Appellee's Brief at p. 20), but of producing someone among the specifically named policemen who were there (Inspector Walsh, Detective Alfano, Sergeant Murphy, F.B.I. agent Barrows and others) who could testify to what went on in the room. This was the People's burden, not appellant's, although appellant's efforts to have them called fell on deaf ears (HM 24-28;T. 622). Since this was the People's burden and since they did not meet it, neither they nor the Huntley hearing court could simply rest on the negative inference from a finding of the incredibility of appellant's testimony of beatings. In the first place, the above described facts of mental coercion did not come only from his testimony, and in the second place, a party having the burden of proof may not rely on such a negative inference. Haynes v. Washington, 373 U.S. 503, 510; Jackson v. Denno, 378 U.S. 368, 380, 391, 393-394; Dyer v. McDougall, 201 F. 2d 265, 269 (2d Cir., 1952); cf. United States v. Jenkins, 2d Cir., decided February 10, 1975 (Docket No. 74-2257) slip op. 1763-1771 at 1768-1770.

3. It is evident that appellant did not receive a fair Huntley determination with the application of proper constitutional standards, because the same judge who rejected mental coercion as a proper consideration for the jury on the issue of voluntariness, presided at the Huntley hearing and made no mention of the mental coercion issue as raised by the established facts taken from the testimony of the police themselves. (In Reply to Appellee's Brief at pp. 19,25,30). Thus, since this judge had once on the record stated his own position that mental coercion was not a factor in the determination of voluntariness, and since he made no mention of it in his opinion in the Huntley hearing, it must be assumed that the judge did not apply a standard of mental coercion to the established facts. At the very least, contrary to the Attorney General's absurd argument, " it [cannot] be assumed that the correct standards of federal law were applied to the facts, [simply because] it decided not to exclude petitioner's confession." (Appellee's Brief at p. 25).

Furthermore, the Huntley Court made no findings with respect to mental coercion. The Attorney General's assertion that certain findings were made is based on selective extraction from sections of the opinion wherein the Huntley court simply summarizes all the testimony before it on the hearing, including appellant's and Jones' and Johnson's. (In Reply to Appellee's Brief at pp. 18-19 et seq.) Findings, if they are findings, do not occur in the opinion until the second paragraph on the next to the last page, where the Court apparently discussed appellant's

credibility as impugned by his failure to call Jones and Johnson at the trial (which, of course, he tried unsuccessfully to do [T. 622]), and by his failure to complain of his beatings to the prison doctor. On that basis alone the Huntley court simply concludes that the confessions "were voluntarily made and were not the result of physical coercion of any kind." Thus, it is once again evident that the Court's only consideration was appellant's credibility. This consideration leaves out entirely all the factors of mental coercion which arose from the police testimony.

4. The only evidence against appellant, apart from that derived from his confessions, was the severely attacked identification testimonies. The Attorney General attempts to give the impression that the two $5 bills were additional evidence (Appellee's Brief at p. 8). However, those bills, identified by a teller in the bank, were secured from appellant as a result of all the coercive circumstances, and appellant's revelation of the money was in itself the first of the series of confessions he gave to the police on the afternoon of the 18th. Thus, the $5 bills should have been excluded as the tainted result of involuntary confessions, and they do not constitute independent evidence of his guilt.

5. Much is made of appellant's failure to complain of his beatings to the various arraigning magistrates on February 19 and 25, but on both these occasions appellant was unrepresented

by counsel (the minutes are attached hereto). Although he learned much about the criminal process as time went on, appellant can't be charged with a lie that the beatings occurred simply because in his first week of incarceration he didn't know to exercise every available opportunity to make an essentially legal motion or because he didn't know when or who would hear him on the issue. In any case, Arsenault forbids the use of those proceedings against a then uncounseled defendant (see main Brief), and appellant did complain once he began to appear with counsel * on February 28, and before that, according to the prison doctor's record, on February 26, exactly one week after his release from police precinct custody (T. 464). Of course, appellant testified that he complained to the doctor on February 20, the day after his incarceration; that his complaints were ignored is substantiated by the doctor himself who testified, "usually I don't listen, I am not interested whether somebody was beaten up..." (T. 499).

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* Appellant additionally asserts that on the morning of February 25, 1958, he was arraigned in Magistrate's Court where a lawyer did represent him and where he did complain of the beatings to the Magistrate. Appellant apparently has the minutes of those morning proceedings among his possessions retained by Bayview Correctional Facility, but he cannot now obtain them. The afternoon proceedings in Bronx County Court indicate no lawyer present on his behalf, but reference is made to the morning proceedings. Should this Court find the issue of importance, appellant requests permission to obtain those minutes from Bayview accompanied by Federal Marshalls.

CITY MAGISTRATES COURT OF THE CITY OF NEW YORK

BRONX ARREST COURT

* *

THE PEOPLE OF THE STATE OF NEW YORK * Docket 819

* Charge:

-against-

* ROBBERY

ALFRED LEWIS,

*

Defendant.

*

* *

February 19, 1958

B e f o r e:

HON. NICHOLAS F. DELAGI

City Magistrate.

A p p e a r a n c e:

For the People:

THEODORE EPPINGER, ESq.
Assistant District Attorney
Bronx, New York.

(The defendant was not represented by counsel on February 19, 1958)

HARRY MANN

Official Court Reporter

ARRAIGNMENT OF DEFENDANT

THE COURT OFFICER: 819, Alfred Lewis, charged with robbery. Officer Corbett, raise your right hand, you swear to the truth of this affidavit?

THE OFFICER: I do

THE COURT OFFICER: Put your hand down.

(To the defendant): You are charged with robbery. The officer states that on February 6th, 1958, at 12:30 P. M., at 3015 Third Avenue, in a bank, you did take, steal and carry away property of the Manufacturers Bank, by force and violence, without consent, in that you did take $11,392. in United States currency, property of this bank, by means of a loaded revolver.

Do you understand that?

THE DEFENDANT: I understand.

THE COURT OFFICER: Pardon me?

THE DEFENDANT: I understand.

THE COURT OFFICER: On this charge you have the right to communicate with relatives or friends free from the office of the warden. You have the right to the aid of an attorney, or you could get

this case put off to get your own lawyer and witnesses. You are being held on a short affidavit. The officer needs more time to complete his investigation.

THE COURT: Do you understand this charge?

THE DEFENDANT: Yes.

THE COURT: Do you intend to get a lawyer?

THE COURT OFFICER: Speak up so that the Judge can hear you.

(The defendant shook his head "Yes".)

THE COURT: Do you wish an adjournment for that purpose?

(No answer)

Do you want the case to go over to give you an opportunity to get a lawyer?

THE DEFENDANT: Yes, sir.

THE DISTRICT ATTORNEY: The people are asking for an adjournment until Tuesday, February 25th, your Honor.

THE COURT: Is that date satisfactory to you, the 25th, Tuesday?

THE DEFENDANT: Yes, I think so.

THE COURT OFFICER: Speak up so that the Judge

can hear you.

THE COURT: Is that "Yes, I think so", yes or no?

THE DEFENDANT: Yes.

THE COURT: Because of your record, you are held in no bail, February 25th, consent.

THE COURT OFFICER: You could write or telephone free from the jail.

(CASE ADJOURNED TO FEBRUARY 25, 1958. DEFENDANT HELD IN NO BAIL.)

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COURT REPORTER'S CERTIFICATION

I HEREBY CERTIFY that the foregoing is a complete and correct transcript of the arraignment.

Harry Mann

Harry Mann, Official Court Reporter

Indictment No. 219/1958

COUNTY COURT: BRONX COUNTY

- X

THE PEOPLE OF THE STATE OF NEW YORK :

against : Arraignment

ALFRED LEWIS, :

Defendant :

- X

(Robbery in the 1st Degree)

New York, February 25, 1958

BEFORE:

Hon. WILLIAM LYMAN,

County Judge

APPEARANCES:

FOR THE PEOPLE:

DANIEL V. SULLIVAN, Esq.,
District Attorney, Bronx County
By: EDMUND C. FARRELL, Esq.,
Assistant District Attorney

DEFENDANT-IN-PERSON

Edward Schwartz
Official Court Reporter

COURT CLERK HIRSCHER: Alfred Lewis, you are arraigned on a bench warrant, chargingyou with the crime of robbery in the first degree for the purpose of fixing bail. What bail do The People ask?

MR. FARRELL: The People ask $50,000.00.

THE COURT: What are the circumstances?

MR. FARRELL: This is a bank robbery. The defendant has a prior felony conviction.

THE COURT: Is this the armed robbery of the bank on Third Avenue and 156th Street?

MR. FARRELL: Yes.

THE COURT: Have you gotx a lawyer?

DEFENDANT: I have a lawyer. I am supposed to have one.

THE COURT: What?

DEFENDANT: I have a lawyer. At least I am supposed to have one. I don't know where he is. I saw him this morning.

THE COURT: What is his name?

DEFENDANT: Greenberg.

THE COURT: What is his first name?

DEFENDANT: I don't know.

THE COURT: Do you know wherehis office is?

DEFENDANT: Somewhere out in Long Island.

THE COURT: Do you expect to have him here Friday morning when the case will be on for pleading?

DEFENDANT: Yes.

THE COURT: All right. Bail is fixed in the sum of $50,000.00. He has a prior felony conviction?

MR. FARRELL: Yes, Judge.

THE COURT: All right. $50,000.00 bail.

Certified to be a true and correct transcript of minutes.

Edward Schwartz

Edward Schwartz
Official Court Reporter

CONCLUSION

FOR THE ABOVE STATED REASONS, AND THE REASON S STATED IN APPELLANT'S MAIN BRIEF, THE JUDGMENT OF THE DISTRICT COURT SHOULD BE REVERSED AND APPELLANT'S PETITION GRANTED, OR ALTERNATIVELY, THE CASE REMANDED FOR A HEARING.

Respectfully Submitted,

LAWRENCE STERN
Attorney for Appellant
11 Monroe Place
Brooklyn, N.Y. 11201
875-4304

STATE OF NEW YORK)
CITY OF NEW YORK) ss.:
COUNTY OF NEW YORK)

Lawrence Stern being duly sworn, deposes and says:

That he is [redacted], the attorney for the above-named appellant herein. That on the 13 day of March 1975, he served the within brief upon Attorney General of State of New York above-named respondent, by depositing a true copy of the same securely enclosed in the post-paid wrapper in the Letter Box, Official Depository maintained andexclusively controlled by the United States [redacted] directed to said attorney for the respondent at 2 World Trade Center, New York, N.Y. that being the address within the State designated by him for that purpose upon the preceding papers in this action, or the place where he then kept an office between which places there was and now is a regular communication by mail.

Said deponent is over the age of twenty-one years.

Lawrence Stern

Sworn to before me this
13th day of March 1975

Domenick J. Porco

DOMENICK J. PORCO
COMMISSIONER OF DEEDS
CITY OF NEW YORK 3-[illegible]
Commission Expires Nov. 1, 1976